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No. 07-658

In The
Supreme Court of the United States

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, ET AL.,
Petitioners,

v.

THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

The *Petition for Certiorari* (*Petition*) points out the crucial distinctions at the heart of this appeal. First, the difference between acting pursuant to a statutory grant of authority and acting in defiance of crystal clear Congressional and Constitutional proscriptions. Second, the difference between exercising jurisdiction over *transactions* and exercising jurisdiction over local distribution and generation *facilities*, a distinction the Circuit below easily recognized in a decision that predates the one before the Court in this proceeding.[1]

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[1] Whatever else *Detroit Edison Co. v. FERC*, 334 F.3d 48 (D.C. Cir. 2003) decided, it clearly recognizes, and relies upon, the fundamental distinction between jurisdictional *facilities* and jurisdictional *transactions*. Citing, inter alia, *New York v. FERC*, 535 U.S. 1, 23 (2002), the panel states at *Detroit Edison*, 334 F.3d at 50 that:

> FERC created a seven-factor test to determine whether a given facility is a local distribution facility (over which FERC has no jurisdiction) or a transmission facility (over which FERC does have jurisdiction.)

After defining State-jurisdictional *local distribution facilities* – the panel, Id. at 51, effectively distinguishes the exercise of jurisdiction over *transactions* over such facilities from the exercise of jurisdiction over the facilities themselves:

> "When a *local distribution facility* is used to deliver energy to an unbundled retail customer, *FERC lacks any statutory authority*, and the [S]tate has jurisdiction over that *transaction*. . . . By contrast, when a local distribution facility is used in a wholesale *transaction*, *FERC has jurisdiction over that transaction* pursuant to its wholesale

No one contests that FERC has jurisdiction over wholesale power *transactions*. No one contests that FERC has a statutory obligation to remedy undue discrimination *in jurisdictional transactions*. But neither charge can give FERC authority to compel the exercise of State eminent domain authority or to override Congress' mandate that the agency "*shall not* have jurisdiction . . . over *facilities* used for the generation of electric energy or over *facilities* used in local distribution." 16 U.S.C. § 824(b)(1) {emphasis added.}

The D.C. Circuit's failure to recognize these distinctions raises serious constitutional concerns and conflicts with precedent from this Court and others. FERC's eight page "argument" fails to rebut petitioners' contentions that certiorari is warranted. *FERC Opposition* (*FERC Opp.*) at 9-16. With few

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jurisdiction under FPA § 201(b)(1). . . . FERC asserts that Midwest's distribution facilities are FERC-jurisdictional because they are used for both wholesale and retail distribution. Id. at 54. . . . FERC's position contradicts the plain language of the FPA. Section 201(b)(1) denies FERC jurisdiction over "facilities used in local distribution." . . . FERC would rewrite the statute to exclude only "facilities used *exclusively* in local distribution." Such an interpretation would eviscerate [S]tate jurisdiction over numerous local facilities, in direct contravention of Congress' intent. . . . Moreover, the orders under review totally ignore Order 888's carefully formulated seven-factor test for distinguishing between local distribution facilities and "FERC-jurisdictional facilities," which this Court ultimately approved." {emphasis added and internal citations not shown}.

exceptions, FERC does little other than quote or restate the rationale of the opinion below (or its own *Order*) rather than responding directly to petitioners' critiques of the legal deficiencies and internal contradictions that augur for review.

I. FERC PROVIDES LITTLE OR NO RESPONSE TO PETITIONER CLAIMS THAT REVIEW IS CRITICAL TO ADDRESS CONSTITUTIONAL CONCERNS AND CONFLICTS WITH PRECEDENT RAISED BY FERC'S ORDER COMMANDEERING STATE EMINENT DOMAIN AUTHORITY.

FERC dismisses petitioners' extensive exegesis of FERC's usurpation of State eminent domain authority and related constitutional concerns, *Petition* at 15-26, by quoting, with virtually no elaboration, its original order and the majority's rationale below.[2] It argues that FERC is

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[2] FERC quotes the Court (which itself is basically quoting FERC statements below) that "Order No. 2003 does "nothing more than impose a non-discrimination provision on public utilities." *FERC Opp.* at 10. However, FERC's charge to remedy discrimination can not override *specific statutory limits* on its jurisdiction. In an analogous circumstance, the Federal Communications Commission argued "the nondiscrimination principle that motivated the 1996 Telecommunications Act mandates that the FCC prohibit a utility from "favor[ing] itself over other parties with respect to the provision of telecommunications or video programming services." *Southern Company v. FCC*, 293 F.3d 1338, 1346-1347 (11th Cir. 2002). That Court conceded that "the principle of nondiscrimination is the primary purpose of the 1996 Act," but, significantly, then notes that courts (and agencies):

> "must construe statutes in such a way as to 'give effect, if possible to every clause and word. . . {internal citation omitted}. . . . ***By***

only regulating a public utility, and there is only an "incidental effect" on the States. In FERC's eyes no "compulsion" occurs. *FERC Opp.* at 10-11.

FERC does not address the obvious conflict between the D.C. Circuit's rationale and the decisions of this Court and other Circuits cited in the *Petition* at 2-3, 19-20 and in Judge Sentelle's dissent below. FERC simply ignores these cases, presumably because they establish that a utility has no authority to exercise eminent domain for its own generation unless the State authorizes and conditions such authority. See, e.g., *Handley v. Cook*, 252 S.E.2d 147, 149 (W. Va. 1979). See also *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 368 n.1 (1974) (Marshall, J. dissenting).

FERC does not address the fundamental flaw noted in the *Petition* at 21-23, that neither FERC nor the Court below have referenced *any* provision of the Federal Power Act, which grants FERC or independent generators eminent domain authority or authorizes FERC to determine the manner in which State-granted authority should be exercised. With no statutory authorization, FERC cannot, and does not, explain why *Order No. 2003* and the decision below are not contrary to this Court's

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attempting to extend those generally applicable rules into an area where the statutory text clearly directs that they do not apply, the FCC is subverting the plain meaning of the act." *Southern Company*, 293 F.3d at 1347. {emphasis added}.

That is precisely what the FERC and the Court below have done in the case at bar.

holdings in *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) and *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 374 (1986), which preclude a federal agency from preempting sovereign State powers unless Congress has conferred such authority on the federal agency with *unmistakable clarity*.

FERC does not dispute that utilities will have to seek State authority for eminent domain rights for independent generators in certificate proceedings, which are legislative in nature. *Petition* at 25. Instead, FERC baldly alleges that its requirement that utilities exercising eminent domain authority for their own generation also exercise that authority on behalf of independent generators, does not "compel" either [1] the exercise of eminent domain power or [2] States to take any actions to enforce the FERC's requirement.[3] This statement ignores reality and is internally inconsistent.

State mechanisms and officers *are* compelled to enforce FERC's scheme. An "independent generator's" request for the use of eminent domain, like other exercises of condemnation authority, could be (and undoubtedly often will be) challenged or contested in State tribunals. Even if uncontested, State procedures, and often State courts, will be

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[3] See *FERC Opp.* at 10-11 arguing *Order No. 2003* "does not compel [S]tate officials to take any action or to enforce any of FERC's regulatory requirements. . . ." nor "require [S]tates to enact any laws or regulations, and it does not require [S]tate officials to assist in the enforcement of federal statutes regulating private individuals."

used to implement and enforce this FERC scheme.[4] Moreover, FERC's rationale implies that, rather than being compelled, States have a "choice" - either [1] authorize the use of eminent domain for both the utility's generation and for any independent generator that requests it, or [2] not authorize it for *any* generation. *FERC Opp.* at 10-11. But neither choice is constitutionally permissible. See *New York v. United States*, 505 U.S. 144, 175-76 (1992).

FERC cannot *direct States to implement its policy*. It cannot *require* States to authorize utilities to exercise eminent domain *on behalf of, and at the request of*, independent generators. *New York*, 505 U.S. at 175-176.

The second choice contains a similar constitutional frailty. FERC cannot effectively *deprive* States of the right to exercise their sovereign power of eminent domain to allow State-regulated utilities to take property for public use. As this Court declared in *City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912):

> the right of every State to authorize the appropriation of every description of property for a public use is one of those inherent powers which belong to [S]tate governments, without which they could not well perform their great

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[4] See, e.g., Alaska Stat. § 09.55.290 (eminent domain proceedings may be commenced in superior court); Alaska Stat. § 09.55.310 (jury or master hearing); Alaska Stat. § 09.55.320 (right to jury trial for appeal); Alaska R. Civ. P. 72 (procedures for eminent domain actions).

> functions. It is a power not surrendered to the United States and is untouched by any of the provisions of the Federal Constitution, provided there be due process of law, that is, a law authorizing it, and provision made for compensation.

In any case, prohibiting the use of State eminent domain authority to site new utility electric generation plants (unless FERC's requirements are followed) is not an option for either utilities or State commissions. Utilities' are subject to State public service obligations. States have a statutory duty to ensure that the utilities can provide reliable service. Neither can forgo the use of eminent domain and still comply with these responsibilities. It is also bad policy. If States cannot act, it is only a matter of time before there are serious power shortages. FERC lacks authority to ensure the construction of sufficient electric generation.[5]

II. FERC'S FLAWED REASONING HIGHLIGHTS THE NEED TO REVIEW THE AGENCY'S EXERCISE OF AUTHORITY OVER STATE-JURISDICTIONAL GENERATION AND LOCAL DISTRIBUTION FACILITIES DESPITE 87 YEARS OF CONFLICTING PRECEDENT AND CLEAR STATUTORY PROSCRIPTIONS.

At pages 11-12 of its *Opposition*, FERC purports to respond to the *Petition's* 10-page

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[5] See *Petition* at 7-9, 22-23. The only Federal Power Act provision authorizing eminent domain for generation facilities is unique to hydroelectric generation. See 16 U.S.C. § 814.

explanation, *Petition* at 26-36, of why *Order No. 2003* exceeds FERC's jurisdiction under the FPA. The *Petition* notes that FERC's assertion of jurisdiction over *physical interconnections*, i.e., actual facilities, because they are "dual-use" *distribution* facilities is fundamentally inconsistent with the *Detroit Edison* decision, as well as the regulatory regime specified by the statute and confirmed by previous decisions of this Court. FERC's two paragraph discussion contends that its assertion of jurisdiction over *physical interconnections* to local distribution facilities is *limited* to the use of such facilities to facilitate a FERC-jurisdictional transaction – a wholesale sale. *FERC Opp.* at 11-12.

Petitioners' argument turns on the critical distinction between jurisdictional "facilities" and jurisdictional transactions – yet FERC dismisses this argument in less than a paragraph of conclusory statements that conspicuously all but avoids discussing "*facilities*" and, instead, concentrates entirely on "interconnections" and, later references to all aspects of wholesale transactions as a basis for rejecting Petitioners' concerns. *Id.*

FERC *never* provides a convincing explanation of how its words can be squared with the FPA's specific mandates, or indeed, some of its own statements. See Order No. 2003-C at footnote 42, where the FERC explains that, "when a "dual use" facility is involved in a wholesale sale, we do not claim jurisdiction over the *facility itself*, just the wholesale sale transaction occurring over that facility. See *Detroit Edison*, 334 F.3d at 51

{emphasis added}[6] Basically, FERC contends that requiring a carrier to condemn property for the construction of *what must be State jurisdictional facilities* (otherwise, State eminent domain authority cannot exist) does not amount to "claiming jurisdiction over the facility itself," but is mere "interconnection." Nor is, apparently, FERC's effort to exert federal jurisdiction over siting, construction, procurement, and the physical link between generating and local distribution facilities. See *e.g.*, *Petition* at 10-11

FERC cannot, and does not, adequately explain how it hurdles the textual limits on its *transaction-based* wholesale jurisdiction to obtain the right to control physical alterations to an otherwise State-jurisdictional *facility*. But even if it could, FERC *nowhere* provides a convincing explanation for how its jurisdiction can attach to State-jurisdictional facilities, ***which it flatly concedes may never actually be used in a wholesale transaction***.[7] In Order No. 2003-A,

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[6] Compare *Petition* at 31 and footnote 1 supra. Earlier, Petitioners pointed out the differences between the decision below and the *Detroit Edison* panel's reasoning. FERC's response is to simply recite the flawed contention, adopted below, that Petitioners identify "no requirements of Order No. 2003 that are not directly connected to FERC's undisputed authority over interstate transmission and wholesale sales." Since apparently both FERC and the D.C. Circuit agree that FERC has no authority to require modifications, changes or siting of State jurisdictional facilities, it is not surprising that neither chose to directly address the examples cited on brief and in the record below where FERC asserts such authority.

[7] See, Order No. 2003-C at Para. 51 & 53.

FERC specifies that a generator seeking interconnection doesn't have to present an actual wholesale contract, or even any evidence of its intent to engage in jurisdictional sales at the time of interconnection.[8] Why? According to FERC: "if the Interconnection Customer decides that it will not sell its power at wholesale it would then be subject to [[S]tate jurisdiction and [S]tate jurisdictional charges."[9]

The fact that a generator may intend to sell power at wholesale at some point in the future cannot provide FERC with jurisdiction over the physical interconnection to the State-jurisdictional facility. Only after the distribution facility is constructed can there be a transaction that triggers FERC's wholesale sales jurisdiction. As the D.C. Circuit found in *DTE Energy et al v. FERC*, 394 F.3d 954, 963 (D.C. Cir. 2005) when examining the validity of FERC's assertion of jurisdiction over certain facilities: "the historical purpose or *alleged intended use* of the facilities does not speak to the [jurisdictional classification] issue at hand, which is their present primary function." {emphasis added}

Even if a wholesale transaction occurs, FERC, as noted earlier, leaps from regulating a financial transaction to regulating the physical

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[8] See, Order No. 2003-A at Para. 737 ("We will not require an Interconnection Customer seeking interconnection to facilities. . . to tender proof of a wholesale sale to secure interconnection service").

[9] *Id.*

facility via the *Order's* construction, procurement and engineering specifications. FERC does have jurisdiction over actual wholesale sales transactions that take place over otherwise State-jurisdictional facilities. However, it is impossible to read the statute to allow *FERC to order physical changes to the underlying State jurisdictional facilities – even after* it is clear that FERC-jurisdictional transactions will occur. FERC's authority simply does not reach physical interconnections between generation and local distribution plant.

FERC also argues the D.C. Circuit's decision, and *Order No. 2003*, are not inconsistent with 87 years of precedent from this and other federal and State Courts. *Petition* at 26-36; *FERC Opp.* at 11-14. The flaws in this segment of FERC's analysis are obvious.

FERC cites this Court's decision in *New York v. FERC,* noting correctly, that Petitioners only cite this decision in passing. According to FERC, the *New York* decision, and the underlying circuit court opinion in *Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), "fully support the court of appeals' decision here." This argument is facially unsound.

In *New York,* this Court considered FERC's *Order No. 888* and established a seven-factor test to determine whether a facility meets the statutory definition of "local distribution" (and remains subject to State jurisdiction) or is a transmission facility subject to FERC jurisdiction. Petitioners suggested below that FERC was obligated to utilize this Court-

approved test to implement the agency action at the heart of this appeal.[10] FERC declined to do so. Instead, it opted for a dual jurisdictional theory that – at least applied to State-jurisdictional facilities – is facially inconsistent with the test endorsed by this Court in *New York*.

The *Petition* demonstrates the clear distinction in *New York* (and *Detroit Edison*) between FERC's jurisdiction over transactions and its lack of jurisdiction over distribution facilities. In those cases, FERC did not purport to, *and in fact did not*, exert, directly or indirectly, authority over physical plant classified as local distribution under the seven-factor test. *New York*, 535 U.S. at 22-23. While the language of *Order No. 2003* pays lip service to this established jurisdictional divide, that *Order* actually exercises regulatory authority over State-jurisdictional distribution facilities. Cf. *Petition* at 10-11, 32-34.

The last distinction between *New York* and the case at bar is evident from FERC's *Opposition*. *New York* addressed FERC's jurisdiction to adopt an open access requirement over facilities for the unbundled retail transmission of electricity; it did not address the *novel* issue presented here - jurisdiction over the physical interconnection between generation and distribution facilities. The *Opposition* points this crucial distinction out – while attempting to argue that the opposite is true. At page 3, FERC recognizes that *Order No. 888*, (the subject of the *New York* decision) "did *not* directly

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[10] NARUC, et al. Initial Brief at the D.C. Cir. Appeal at 23-25; NARUC, et al. Reply Brief at the D.C. Cir. Appeal at 6-8.

address the interconnection of electric generating facilities and transmission facilities" as does *Order No. 2003*. *FERC Opp.* at 3. But, after essentially conceding this distinction between its own two decisions (and necessarily also the differences between *New York* and the case at bar), at 13, it asserts that *Order No. 2003* is, after all, consistent with *New York,* because it asserts "nothing more" than the *same* jurisdiction as to distribution-level facilities. *FERC Opp.* At 13-14. It cannot be both.

This pattern of flawed analysis, conclusory statements, and logical inconsistencies permeates the remainder of FERC's *Opposition*, but we lack the space to address them here.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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